

1 THE HONORABLE JAMES L. ROBART  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 VANESSA SIMMONDS, )  
10 Plaintiff, ) Case No. 2:12-cv-01937 JLR  
11 and ) DEFENDANT'S REPLY IN  
12 GEEKNET, INC. (f/k/a VA LINUX ) SUPPORT OF RULE 41(D)  
13 SYSTEMS, INC.), a Delaware corporation, ) MOTION FOR COSTS AND  
14 Nominal Plaintiff, ) STAY  
15 v. )  
16 CREDIT SUISSE SECURITIES (USA), )  
17 LLC, a Delaware limited liability company, )  
18 Defendant. )  
\_\_\_\_\_  
)

**NOTE ON MOTION  
CALENDAR: January 25, 2013**

19 Defendant Credit Suisse Securities (USA) LLC ("Credit Suisse") respectfully submits  
20 this reply in further support of its motion under Federal Rule of Civil Procedure 41(d) [Dkt. No.  
21 17] ("Mot.").

22 **INTRODUCTION**

23 As shown in Credit Suisse's opening brief, this action ("Geeknet II") is "based on or  
24 includ[es] the same claim against the same defendant" (Fed. R. Civ. P. 41(d)) as *Simmonds v.*  
25 *Credit Suisse Securities (USA) LLC*, No. 2:07-cv-01583-JLR (W.D. Wash.) ("Geeknet I"). The  
26 Court accordingly may exercise its discretion to award costs, including legal fees, of *Geeknet I*,  
27 and Credit Suisse has provided the Court with detailed information substantiating such costs

1 reasonably incurred. Although no showing of bad faith is required, the underlying purposes of  
 2 the Rule—to deter vexatious litigation and compensate defendants—would be well served with  
 3 an award of costs here, where the timing and effect of Plaintiff's voluntary dismissal of  
 4 *Geeknet I* and filing of *Geeknet II* will cause Credit Suisse to incur needless and burdensome  
 5 further expense defending this action. Plaintiff's acknowledgement in her opposition brief  
 6 [Dkt. No. 23] ("Opp'n") that that she is contemplating the filing of additional such actions  
 7 *seriatim*, without pursuing the efficiencies of coordination, further supports an award of costs.

## 8 ARGUMENT

9 Plaintiff opposes Credit Suisse's motion on four grounds, none of which has merit, and  
 10 the admissions in her brief and supporting declarations only add support for an award of costs  
 11 here.

12 *First*, Plaintiff argues that this case is fundamentally different from *Geeknet I* because it  
 13 alleges certain supposedly different "essential" facts that were supposedly "undiscoverable"  
 14 when Plaintiff filed *Geeknet I*. Opp'n at 2-4. Specifically, Plaintiff contends that *Geeknet II*  
 15 differs in two respects: (1) it alleges a supposedly different Section 13(d) group, composed of  
 16 Credit Suisse, Sequoia Capital, Lehman Brothers, and Wilson Sonsini; and (2) it alleges  
 17 additional, supposedly different "coordinated conduct" among these alleged group members to  
 18 "maximize the spread" between the IPO offering price and aftermarket trading price. *Id.* at 2.  
 19 Credit Suisse will address these supposedly "different" allegations fully in its motion to  
 20 dismiss,<sup>1</sup> but it is of no moment for purposes of the present motion: Even if, as Plaintiff

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21 <sup>1</sup> The group members identified in *Geeknet II*—Credit Suisse, Lehman Brothers, Wilson  
 22 Sonsini, and Sequoia Capital—were in fact all either specifically named as group members in  
 23 *Geeknet I* (in the case of Credit Suisse and Lehman Brothers) or referred to more vaguely as  
 24 "principal shareholders" or as "stock and option holders, as identified in the IPO prospectus"  
 25 (in the case of Wilson Sonsini and Sequoia Capital). See *Geeknet I* Compl. ¶¶ 14, 18; see also  
 26 Prospectus for Initial Public Offering of stock of Linux Systems, Inc. ("Linux Prospectus"), at  
 27 59, 71, available at <http://www.sec.gov/Archives/edgar/data/1096199/0000891618-99-005600.txt> (disclosing Sequoia Capital and Wilson Sonsini share ownership at time of VA  
 Linux IPO). Plaintiff's vague allegation that the alleged group sought to "maximize the  
 spread" between the IPO and aftermarket prices appears to be simply a rewording of her  
 allegation in *Geeknet I* that the group sought to "inflat[e] the aftermarket price of Linux stock  
 to a level sufficiently above the IPO price to enable them to directly and indirectly reap  
 substantial profits from the sale of Linux stock." *Geeknet I* Compl. ¶ 13.

1 asserts, these are new, different allegations, in service of new, different claims, *Geeknet II*  
 2 nonetheless triggers the applicable standard under Rule 41(d), which requires merely that the  
 3 second action be “based on or include[] the same claim against the same defendant.” *See*  
 4 *Russell-Brown v. Jerry, II*, 270 F.R.D. 654, 660 (N.D. Fla. 2010) (“[T]he mere addition of a  
 5 defendant or a new claim or two does not prevent the application of Rule 41(d) so long as there  
 6 are claims in the new case that arise from the same nucleus of operative facts such that the new  
 7 case can be said to be ‘based on or including’ previously brought and dismissed claims.”).

8 Here, *Geeknet II* is plainly based on, and includes, numerous claims against Credit  
 9 Suisse that Plaintiff previously brought and voluntarily dismissed, as even a cursory  
 10 comparison of the two complaints confirms. For example:

- 11     • Both complaints concern the Linux IPO in December 1999, and both allege that  
     12 Credit Suisse and Lehman Brothers were part of a supposed group that  
     13 collectively owned more than a 10% interest in Linux. *Compare* Amended  
     14 Complaint ¶ 18, *Simmonds v. Credit Suisse Securities (USA) LLC*, No. 2:07-cv-  
     15 01583-JLR, Dkt. No. 9 (hereinafter “*Geeknet I Compl.*”) *with Geeknet II Compl.*  
     16 ¶¶ 4.1, 5.2.
- 17     • Both complaints claim that group members saw Linux as a potentially “hot”  
     18 IPO, and both allege that the group members, using their influence as insiders,  
     19 coordinated efforts to inflate the aftermarket price of Linux stock. *Compare*  
     20 *Geeknet I Compl.* ¶ 11, 13, *with Geeknet II Compl.* ¶¶ 4.1, 4.4, 4.5.
- 21     • Both complaints allege that Credit Suisse and Lehman Brothers supposedly  
     22 created the opportunity for themselves directly and indirectly to share their  
     23 customers’ profits from sales and purchases of Linux stock in violation of  
     24 NASD Conduct Rule 2330(f). *Compare* *Geeknet I Compl.* ¶ 12(a) *with Geeknet II Compl.* ¶ 4.8.
- 25     • Both complaints allege that Credit Suisse and Lehman Brothers, in conjunction  
     26 with other Group members, required certain customers, in return for allocations  
     27 of Linux IPO shares, to purchase additional shares of Linux stock in the  
     aftermarket at higher prices (a practice referred to as “laddering”). *Compare*  
     28 *Geeknet I Compl.* ¶ 12(b) *with Geeknet II Compl.* ¶ 4.9.
- 29     • Both allege that the Linux IPO featured lock-up agreements that were structured  
     30 to permit some Linux shares to be released early from lock-up periods, and that  
     31 group members profited from the early release of lock-up agreements. *Compare*  
     32 *Geeknet I Compl.* ¶¶ 14, 15 *with Geeknet II Compl.* ¶ 4.7.
- 33     • Both allege that Credit Suisse analyst reports furthered the common objectives  
     34 of the Group by issuing a “Buy” rating on Linux stock when it traded at  
     35 approximately \$190. *Compare* *Geeknet I Compl.* ¶ 17 *with Geeknet II Compl.* ¶  
     36 4.10.

- 1     • Both complaints assert a Section 16(b) claim arising from the Linux IPO, under  
2       which Credit Suisse, as part of a beneficial ownership Group, supposedly  
3       obtained profits from short-swing transactions in Linux stock, and that Credit  
4       Suisse is required to disgorge those profits under Section 16(b). *Compare Geeknet I Compl.* ¶¶ 19, 22 *with Geeknet II Compl.* ¶¶ 5.2, 5.3.
- 5     • Both complaints seek the same remedy: disgorgement of Credit Suisse's  
6       supposed short-swing profits, and fees for plaintiff's attorneys. *Compare Geeknet I Compl.* at p. 9 *with Geeknet II Compl.* ¶¶ 6.1, 6.3.

7 Plaintiffs contends that these many and substantive similarities are merely "superficial," *see*  
8 Opp'n at 3, but however characterized, Plaintiff persists in asserting them in *Geeknet II* and  
9 they more than suffice for purposes of Rule 41(d).

10       **Second**, Plaintiff argues that her conduct does not support an exercise of the Court's  
11       discretion to award costs. *Id.* at 4-7. Plaintiff argues that her conduct was not vexatious or an  
12       attempt to gain impermissible tactical advantage, contending that that she and her lawyers did  
13       not know about, and could not have known about, the supposedly "new" group allegations  
14       when they brought the prior action in 2007. But even crediting just for sake of argument  
15       Plaintiff's claim that supposedly new "key evidence" only "surfaced" in a **December 2009** blog  
16       post (*see id.* at 3; *see also* Simmonds Decl. at 1-2 [Dkt. 25]), Plaintiff offers no explanation as  
17       to why she did not file *Geeknet II* until **November 2012**, almost three years after the December  
18       2009 article, but instead continued to litigate *Geeknet I* until voluntarily dismissing it in **June**  
19       **2012**.<sup>2</sup> Whether or not *Geeknet II* is actually "a different suit involving different group  
20       members engaging in different conduct" (Opp'n at 6), for present purposes, the key point is that

21       <sup>2</sup> It is obvious that *Geeknet II* is time-barred even under the claimed "discoverability"  
22       timeline set forth in Plaintiff's opposition. Moreover, as Credit Suisse will show more fully in  
23       its motion to dismiss, Plaintiff actually alleges nothing "new" in the *Geeknet II* complaint,  
24       including as to Wilson Sonsini and Sequoia, that she could not have alleged based on the 1999  
25       VA Linux IPO prospectus and other sources dating from shortly after the IPO, and all readily  
26       obtainable on the Internet. *See, e.g.*, Linux Prospectus at 59, 71 (disclosing Wilson Sonsini and  
27       Sequoia share ownership prior to IPO); Henry Norr, *Bay Tech Firm's Hot Debut*, San Francisco  
Chronicle, Dec. 10, 1999, at A1, *available at* <http://www.sfgate.com/bayarea/article/Bay-Tech-Firm-s-Hot-Debut-Shares-soar-record-2891072.php> (noting after IPO that Sequoia Capital held  
a 23% stake in VA Linux, then worth \$2.16 billion); Renee Deger, *Wilson Cashes in as Linux IPO Explodes*, The Recorder, Dec. 13, 1999, *available at* <http://www.law.com/jsp/article.jsp?id=900005514058> (noting Wilson Sonsini and related  
entities held 102,584 shares of VA Linux, worth \$25.66 million after first day of trading).

1 by her own admission Plaintiff chose to sit on *Geeknet II* for years while continuing to litigate  
 2 *Geeknet I*, and then voluntarily dismissed *Geeknet I* with, as she acknowledges, deliberately  
 3 “careful” wording to allow her to bring *Geeknet II*. This had the vexatious effect of  
 4 sidestepping the Court’s Minute Order requiring leave to file an amended complaint, and  
 5 avoiding the entry of a judgment in *Geeknet I* and the collateral effect it would likely have had  
 6 on pursuing *Geeknet II*. Such conduct exemplifies precisely what Rule 41(d) is meant to deter.

7       **Third**, Plaintiff argues that any award should include only expenses, not fees. But the  
 8 clear weight of authority holds that courts can award fees in addition to expenses. *See Mot.* at 6  
 9 n.3 (collecting cases); *see also Aloha Airlines, Inc. v. Mesa Air Group, Inc.*, 2007 WL 2320672,  
 10 at \*3 (D. Haw. 2007) (noting that the “majority of courts . . . have awarded attorneys’ fees  
 11 under [Rule] 41(d) outright, recognizing that including attorneys’ fees as part of an award of  
 12 costs is consistent with the purposes of Rule 41(d)”). Credit Suisse submits that this  
 13 interpretation of Rule 41(d) is more consistent with the Rule’s twin purposes of deterring  
 14 vexatious litigation and compensating defendants. *See Mot.* at 4-5 (discussing purposes of  
 15 Rule 41(d)).

16       **Fourth**, Plaintiff quibbles with the reasonableness of certain fees and expenses that  
 17 Credit Suisse incurred. Credit Suisse recognizes the Court’s discretion in awarding fees, and  
 18 notes that plaintiff’s calculation of fees and costs also entitles Credit Suisse to an award.  
 19 However, Credit Suisse stands by the reasonableness of its calculation in its motion, and that  
 20 the amount sought—\$24,278—is hardly excessive for a complex securities action litigated for  
 21 over four years and through a successful appeal to the Supreme Court. In particular, Credit  
 22 Suisse submits that the number of attorneys who worked on the case was reasonable in light of  
 23 the case’s long duration and complexity. The bulk of time expended by WilmerHale during  
 24 most phases of the case was incurred by only two attorneys, David Lesser and Fraser Hunter. It  
 25 was also reasonable to add three WilmerHale attorneys—Andrew Vollmer, Noah Levine, and  
 26 Janet Carter—to the case at the Supreme Court stage given their specialized experience. Lane  
 27 Powell attorneys’ expenditures of time on this case, including travel by one attorney to the

1 Supreme Court, were also reasonable in light of Lane Powell's role in the case as liaison  
 2 counsel for all of the Underwriter Defendants, including Credit Suisse. And, as explained  
 3 previously, for multiple reasons the costs requested herein already reflect a substantial discount  
 4 from the actual expenses and fees properly attributable to defense of *Geeknet I* as part of the  
 5 Coordinated Cases. *See* Mot. at 6-7.

## 6 CONCLUSION

7 For the foregoing reasons and those stated in its opening brief, Credit Suisse  
 8 respectfully requests that the Court order plaintiff to pay \$24,278 in costs in connection with  
 9 *Geeknet I*.<sup>3</sup>

10 DATED: January 25, 2013

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25  
 26 <sup>3</sup> In light of the Court's January 18, 2013, ruling on the scheduling of briefing on the  
 motion to dismiss, and Plaintiff's representation to the Court that she will "immediately" pay  
 any costs awarded, Credit Suisse agrees that no stay is warranted at this time, in advance of a  
 27 ruling on the motion to dismiss.

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1                   **CERTIFICATE OF SERVICE**

2                   Pursuant to RCW 9.A.72.085, the undersigned certifies under penalty of perjury under  
3                   the laws of the State of Washington and the United States, that on the 25th day of January,  
4                   2013, the document attached hereto was presented to the Clerk of the Court for filing and  
5                   uploading to the CM/ECF system. In accordance with their ECF registration agreement and the  
6                   Court's rules, the Clerk of the Court will send e-mail notification of such filing to the  
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11 DATED this 25th day of January, 2013 at Seattle, Washington.

12 s/Laurel Hooper  
13 Laurel Hooper